

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

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UNITED STATES COAST GUARD : DECISION OF THE
:
: VICE COMMANDANT
vs. :
:
:
MERCHANT MARINER'S LICENSE : NO. 2548
NO. 645588 :
Issued to: Michael J. Sweeney, :
:
Appellant :
_____:

A petition for stay of the effect of Vice Commandant Decision on Appeal 2546 has been taken
pursuant to
46 C.F.R. §5.715.

BACKGROUND

By an order dated 21 June 1991, an Administrative Law Judge of the United States Coast
Guard at Alameda, California

suspended Appellant's License and Merchant Mariner's Document outright for six months with six additional months suspension remitted on twelve months probation, upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 27 December 1990,

Appellant wrongfully used marijuana as evidenced by a urine specimen collected on that date pursuant to a drug test program required by his employer, San Francisco Bar Pilot Association.

The Administrative Law Judge's final order suspending all licenses and documents issued to Appellant was entered on

21 June 1991. Service of the Decision and Order was made on

28 June 1991. Appellant filed a notice of appeal on 2 July 1991. On 3 July 1991, the Administrative Law Judge granted Appellant's written request for a temporary license in accordance with

46 C.F.R. §5.707. Appellant subsequently perfected his appeal by filing an appellate brief on 1 August 1991. On 3 January 1992, the temporary license was reissued with the Commandant's authorization. On 18 February 1992, without deciding the merits of Appellant's appeal, Decision on Appeal 2535 remanded the case back to the Administrative Law Judge, and directed him to reopen the hearing for the reasons discussed therein. (Decision on Appeal 2535 at 9).

In accordance with the terms of the license, and pursuant to 46 C.F.R. §5.707(d), the issuance of Decision on Appeal 2535 voided Appellant's temporary license. Appellant then filed an interlocutory appeal with the National Transportation Safety Board (NTSB). On 11 May 1992, the NTSB reversed Decision on Appeal 2535. In Vice Commandant v. Sweeney, NTSB Order EM-165 (1992), the Board directed the return of Appellant's temporary license to him and that the merits of his appeal be addressed.

On 30 June 1992, I issued Decision on Appeal 2546, affirming the Administrative Law Judge's Decision and Order. This action again voided Appellant's temporary license. On 7 August 1992, Appellant timely filed a notice of appeal of Decision on Appeal 2546 with the NTSB. In accordance with 46 C.F.R. §5.715(b), Appellant's notice also requested the Commandant to issue another temporary license pending the results of his second appeal to the NTSB. In effect, Appellant requests a stay of Decision on Appeal 2546. Accordingly, this request will be treated as such and is properly before me for review.

Appearance: John E. Droeger, Esq., World Trade Center, Suite 261, San Francisco, CA 94111.

OPINION

The issue in granting a temporary license is whether Appellant's service would be compatible with safety at sea.

46 C.F.R. §5.707(c); 46 C.F.R. §5.707(a). In Decision on Appeal 2440 (Lyons), a federal pilot was found to have operated a merchant vessel while under the influence of intoxicants. The Administrative Law Judge (ALJ) suspended his license for one year outright and then denied the request for a temporary license pending appeal. The Commandant upheld the ALJ's denial of the temporary license, because the charge had been proven and because

"Appellant's position as a pilot entails enormous responsibilities for the safety of the crew cargo and vessel." The NTSB reversed the decision of the Commandant and held, that where the basis for denial of the temporary license is based solely on proof of the charge at the administrative hearing, "the Coast Guard must do more than state that offense to justify the denial of a temporary license." Commandant v. Lyons, NTSB Order EM-141 (1987). In this case, Appellant is also a federal pilot. The sole basis for denial of his temporary license is that he is a drug user, the charge found proved at the hearing. Unless some basis for denial is established, other than proof of the charge alone, Appellant should be issued a temporary license.

For certain offenses, the regulations establish a presumption that the continued service of the Appellant is "not compatible with safety at sea" and a temporary document or license may be denied on the basis of the proven charge alone. 46 C.F.R. §5.715(a). Use of dangerous drugs, however, is not one of the incorporated offenses which raises such a presumption. Without this regulatory presumption, denial of a temporary license to a mariner whose license was not revoked for being a user of dangerous drugs requires the Coast Guard to establish additional proof of incompatibility, such as but not limited to, evidence that between the incident and the hearing, Appellant engaged in conduct similar to the subject of the original charge. Lyons, supra at 5. Evidence submitted in mitigation or aggravation may also be considered in the decision to grant or

deny the temporary license. See Commandant v. Tombari, NTSB Order 150 (1989).

The Administrative Law Judge's decision to issue a temporary license to Appellant here was determined in accordance with

46 C.F.R. §5.707(c). The NTSB relied, in part, on that determination when it directed me to reissue Appellant's temporary license. As stated in the 11 May 1992 order,

... since the original temporary authorization was issued under the provisions of 46 C.F.R. §5.707, appellant presumably had been found qualified under that regulation for the issuance. Since no circumstance warranting any new conclusion about his fitness to serve at sea has been identified, the same regulation cannot now logically be cited as the basis for taking his temporary authority away.
NTSB Order EM-165 at 4.

The Commandant uses the same evaluation standards as the ALJ when determining whether to grant a request for a temporary license. In both cases, the grant or denial of a temporary license is governed by the determination of whether Appellant's service is "compatible with the requirements for safety at sea." As noted by the NTSB, it must be presumed that the ALJ properly found the Appellant qualified under this standard. The Commandant's authorization for reissuance of a temporary license on 3 January 1992, also weighs heavily in the determination here. Most importantly, there is no factual basis warranting a new and different conclusion that Appellant is unfit to serve in his licensed capacity during the pendency of his appeal.

CONCLUSION

There is no regulatory presumption of incompatibility with the requirements for safety at sea for a user of dangerous drugs whose license is not revoked. There is no evidence of a change in circumstances warranting a reversal of the Administrative Law Judge's or Commandant's prior determinations to issue a temporary license to Appellant. Denial of the temporary license based solely on the charge found proved at the hearing would be directly contrary to the holding in Lyons, supra.

ORDER

Appellant's petition for stay of the order of suspension, pending his appeal to the National Transportation Safety Board, is GRANTED.

//S// ROBERT T. NELSON

ROBERT T. NELSON
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 9th day of October 1992.

SWEENEY

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